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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

WILLIE P. ARCENEAUX, ET AL,
Petitioners,

versus

JAMES F. PFISTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDICES THERETO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDICES THERETO

Petitioners, Willie P. Arceneaux, Dudley A. Bernard, Cecil R. Blair, Samuel S. Broussard, William T. Carpenter, Jackson B. Davis, Wellborn Jack, Mike John, Jr., and Harold Montgomery, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on November 14, 1966.

CITATION TO OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Louisiana appear on pages 201 to 205, inclusive, and pages 230 to 232 of the Record. They are unreported and are printed in Appendix "B" hereto, (pp. 20 to 27, infra). The opinions of the Court of Appeals reversing the judgment of the District Court, reported in 376 F. 2d 821, and the opinion of said Court denying a rehearing are also printed in Appendix "B", infra pp. 27 to 32, and p. 33.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1966. The opinion and decree of that Court denying petitioners' petition for rehearing was entered on July 29, 1967. The jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

QUESTIONS PRESENTED

1. Do not the members of a State legislative committee have legislative immunity from civil actions for damages alleging a conspiracy to deprive plaintiffs of constitutional rights when their alleged acts consist only of their approval of a resolution to carry out the purposes for which the committee was organized?

2. Do the rulings of the Court of Appeals violate the Speech and Debate Clause of the United States Constitution, Section 6, Clause 7, by permitting judicial inquiry

into the motives of the members of a legislative committee, and into their votes and actions in approving resolutions to carry out the legislative mandate of the Committee?

3. Can an unsupported affidavit made purely on hearsay, and not on personal knowledge, defeat a motion for summary judgment based on competent evidence, in view of Rule 56(e) of the Federal Rules of Civil Procedure?

4. Can the appellate court give evidentiary effect to an unsupported affidavit which meets none of the requirements of Rule 56(e) of the Federal Rules of Civil Procedure when such affidavit has been rejected by the district judge in his ruling on a motion for summary judgment?

5. Can the allegations of a complaint, unsupported by any admissible or competent evidence of the facts alleged, defeat a motion for summary judgment based on undisputed facts negativing and contradicting such allegations?

STATUTES INVOLVED

The statutory provisions involved are Section 6, Clause 1, of the United States Constitution, House Concurrent Resolution No. 13, Louisiana Legislature 1960, and Rule 56(b) (c) and (e) of the Federal Rules of Civil Procedure. They are printed in Appendix "A" infra, pp. 14 to 19 inclusive, insofar as they are applicable to the questions presented.

STATEMENT OF THE CASE

This is a companion case to *Dombrowski vs. Eastland*, 387 U.S. 82, L. ed. 62, affirming 358 F. 2d 821 insofar as Senator Eastland was concerned, and grows out of the same state of facts.

Petitioners here are third-party defendants in a suit brought by Dombrowski and the Southern Conference Educational Fund, Inc. in the Eastern District of Louisiana. The defendants named in the Dombrowski complaint are Thomas D. Burbank, Commanding Officer of the Louisiana State Police and certain police officers of the State of Louisiana, James H. Pfister, Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, Senator James Eastland, Chairman of the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate, the City of New Orleans (R. 2), Jack N. Rogers, Counsel for the Joint Legislative Committee, and Frederick B. Alexander, Jr., Staff Director of said Committee. (R. 95). Senator Eastland has not been served with process.

The Dombrowski petition alleges that the named defendants entered into a conspiracy under color of State law to deprive plaintiffs of rights, privileges and immunites granted them as citizens of the United States by the laws and constitution of the United States, and in particular the First, Fourth, and Fourteenth Amendments thereof (R. 3-4); that on October 4, 1963, certain police officers of the City of New Orleans and certain state police, acting under the direction of F. B. Alex-

ander, Jr., Staff Director of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, and James H. Pfister, Chairman of said Committee, forcibly entered the business offices of plaintiffs and Dombrowski's residence and proceeded to search and seize their books and records; and that Dombrowski was arrested and booked with violation of Louisiana Revised Statute 14:358, et seq, which statutes relate to subversive activities within the State (R. 5). It is alleged that the above-mentioned searches and arrests were made pursuant to warrants issued by a judge of the Criminal District Court of New Orleans, and were for the purpose of learning the identity of the members of and contributors to the Southern Conference Educational Fund, Inc. in order to harrass and intimidate them and the corporation from exercising their constitutional rights (R. 7). Plaintiff Dombrowski claims damages in the sum of $250,000.00 for humiliation, embarrassment, mental and emotional pain caused by the actions of defendants. The Dombrowski petition contains no allegation whatever that any member of the Joint Legislative Committee other than Pfister, the Chairman, and Alexander, the Staff Director of said Committee, in any way took part in the conspiracy or in the alleged overt acts of seizure and arrest. It is verified by plaintiffs as "true and correct to their information and belief." (R. 15).

Thereafter, in an unverified motion, Respondent Pfister alleged that all acts allegedly performed by him were done under the direction and with the approval of

the Joint Legislative Committee on Un-American Activities of the State of Louisiana, acting in its official legislative capacity and by formal motion duly seconded and approved, and that if plaintiffs received any judgment against him for damages he is entitled to a pro rata contribution from said members who should be made third-party defendants. The Court accordingly entered an ex parte order to bring in the members of said committee as third-party defendants.

Petitioners, as third-party defendants, filed a motion to dismiss, alleging that at all times pertinent to said cause they were acting within the scope of the duties and obligations placed upon them by the Legislature of Louisiana, pursuant to House Concurrent Resolution Number 13 of the Louisiana Legislature of 1960 and were therefore protected by an absolute immunity from liability for their actions in the sphere of their legislative duties (R. 175), and in connection therewith they filed a motion for summary judgment to which was attached affidavits from all of the third-party defendants, petitioners here, setting forth, in detail, facts which show that they are entitled to legislative immunity herein (R. 179-198, incl.). No counter affidavits whatever were filed by Plaintiff Dombrowski, but Respondent Pfister opposed petitioners' motions to dismiss and for summary judgment, and in support of his opposition incorporated therein "all of the pleadings, affidavits, depositions, judgments and minute references heretofore filed in these proceedings." (R. 178). The District Court granted the motions of third-party

defendants to dismiss and for summary judgment (R. 201, 230, Appendix "B", pp. 20 and 27). From this judgment Respondent Pfister appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The appellate court, on November 14, 1966, entered its opinion and decree reversing the judgment of the District Court, 376 F. 2d 821. (Appendix "B", p. 27). The reversal was based on an affidavit filed by Dombrowski, in the early stages of the case, in opposition to a motion by Pfister to dismiss, which affidavit referred to an alleged public statement made by Pfister to the effect that all members of his committee concurred in the operation which took place. Dombrowski's affidavit appears on page 82 of the record, and the Court's comments thereon appear on page 31 of Appendix "B" hereto.

Petitioners' petition for rehearing was denied by the Court of Appeals on June 29, 1967, for the stated reason that the thrust of the original Dombrowski complaint is that the raids were carried out "under the direction and in behalf of [the] defendant." (Appendix "B", page 33).

REASONS FOR GRANTING THE WRIT

1. The decisions of the Court of Appeal conflict with the provisions of Section 6, Clause 1, of the United States Constitution and the applicable decisions of this Court construing the same.

2. The decisions of the Court of Appeals conflict with the Federal Rules of Civil Procedure, particularly

Rule 56, and have so far departed from the accepted and usual course of judicial proceedings as to justify the invocation by this Court of its supervisory powers.

3. The rulings of the Court of Appeals unnecessarily and unlawfully subject petitioners to the time, trouble and expense involved in attending a lengthy jury trial in a distant city, and defending a claim for damages for which they are constitutionally entitled to legislative immunity.

ARGUMENT

1. The rulings below are directly in conflict with applicable decisions of this Court which hold that legislators are immune from liability for what they say or do in legislative proceedings. Absolute immunity has been recognized in cases involving civil rights as well as other matters, and the immunity has been vouchsafed for members of State legislatures as well as for members of Congress, for their actions on the floor of the legislative body as well as in committee sessions and investigations.

The record in this case shows that the only acts of petitioners, in connection with the arrest and seizures complained of, was their vote on a resolution authorizing their Staff Director and Staff Counsel to turn over to the proper authorities all facts brought to their attention concerning the subversive activities of plaintiffs as required by the Concurrent Resolution of the Louisiana

Legislature.(1) These facts are undisputed by Pfister, by the Plaintiffs, and by all parties to the proceedings. Petitioners, however, must stand trial before a jury for damages for their legislative acts, unless this Court reviews the matter and grants certiorari.

The most recent decision of this Court with which the rulings complained of conflict, is that of *Dombrowski vs. Eastland*, 387 U.S. 82, 18 L. ed. 2d 577. Under identical facts this Court recognized the legislative immunity of Senator Eastland from a suit for damages for the part that he is alleged to have taken in the same arrests and seizures.

This Court has consistently ruled that Article 1, Section 6 of the United States Constitution protects members of Congress from suits for damages for any "speech or debate" in either house, and that the immunity is not limited to speech or debate, but extends to all acts of legislators performed within the outer perimeter of their official duties, either on the floor of the House or in Committee.

Kilbourn vs. Thompson, 103 U.S. 168, 26 L. ed. 377.

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(1) Motion of Pfister, R. 162 et seq.

Affidavits of Members of Joint Committee, R. 180 to 200, inclusive.

Affidavit of Pfister, R. 76, Pfister's Deposition, R. 122-123.

Minutes of Committee Meeting, September 30, 1963, R. 225, Appendix "C" infra Page 34.

Tenney vs. Brandhove, 341 U.S. 367, 95 L. ed. 1019.

Barr vs. Mateo, 360 U.S. 564, 3 L. ed. 2d 1434.

Uphas vs. Wyman, 360 U.S. 72, L. ed. 1020.

U. S. vs. Johnson, 383 U. S. 169, 15 L. ed 681.

Dombrowski vs. Eastland, 387 U.S. 82, 18 L. ed. 2d 577.

The immunity extends to members of State legislatures as well as to members of Congress.

Tenney vs. Brandhove, supra.

Uphaus vs. Wyman, supra.

2. In its first opinion (Appendix B, p. 27) the Court of Appeals found an issue of fact in an affidavit made by Dombrowski before petitioners were made parties to the suit.(2) This affidavit was directed at Pfister's motion to dismiss and affidavit in support thereof(3) wherein Pfister swore that the only action taken by him and the Joint Committee was to pass a resolution to turn over to the police authorities the facts shown by the Committee's investigation of the subversive activities of the plaintiffs. Dombrowski's affidavit was not made on personal knowledge and purported to quote an unsworn report of an unsworn public statement made by Pfister to

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(2) R. 84
Pfister vs. Arceneaux, et al, 376 F. 2d 823.

(3) R. 70-76, inclusive.

the effect that his Committee "concurred in the operation which took place", namely, the arrest and seizures. Pfister denies having made any such statement,(4) nevertheless the statement, though it might question Pfister's veracity, in no way questions the fact that the concurrence of the Committee consisted of their legislative act in passing resolution to turn the matter over to the police authorities.

In giving probative value to this hearsay affidavit by Dombrowski, the Court of Appeals has ignored the provisions of Rule 56(e) of the Federal Rules of Civil Procedure requiring affidavits opposing summary judgment to be made on personal knowledge setting forth facts admissible in evidence and showing affirmatively that the affiant is competent to testify to the matters set forth therein. Dombrowski's affidavit concerning the report as to what Pfister said may be competent evidence against Pfister, but not against third parties who were not present and did not authorize the alleged public statement. Pfister's offering such an affidavit, concerning a statement which he denies having made, amounts to a rather contradictory self-serving declaration insofar as the committte members, petitioners here, are concerned. In holding that this affidavit, unsupported by other evidence, raises a genuine issue of fact, the Court so far departed from the accepted and usual course of judicial proceedings as to justify the invocation by this Court of its supervisory powers. This Court, and all Courts of Appeal, in which the question has been presented, have ruled consistently that such an

(4) R. 76, 125.

affidavit has no probative value, and must be disregarded in considering motions for summary judgment. See:

Automotive Radio Mfg. Co. vs. Hazeltine, 339 U.S. 827, 831, 94 L. ed. 1312, 1317.

Washington Post vs. Keogh, (CADC) 365 F. 2d 965, 971 cert. den. 385 U.S. 1011, 17 L. ed. 2d 548.

Jameson vs. Jameson, (CADC) 176 F. 2d 58.

Chan Wing Cheung vs. Hamilton, (CA1) 298 F. 2d 459.

Dyer vs. McDougal, (CA2) 201 F. 2d 265.

U.S. vs. Halpern, (CA3) 260 F. 2d 590, 591.

Alger vs. U.S., (CA5) 252 F. 2d 519.

Maddox vs. Aetna Cas. & Surety Co., (CA5), 259 F. 2d 51.

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Neff vs. World Pub. Co., (CA8) 349 2d 329.

Chapman vs. U.S., (CA8) 139 F. 2d 327, 331.

Englehard Inc. vs. Research Instrumental Corp., (CA9) 324 F. 2d 347, cert. den. 377 U.S. 923, 12 L. ed. 2d 215.

Further departure from the accepted rules of procedure was made by the Court of Appeals in its per curiam opinion denying rehearing because the allegations of the Dombrowski complaint raise the question as to

whether or not the Committee's investigation was undertaken for a legitimate purpose, or with an eye to depriving the plaintiffs of their constitutional rights. In thus inquiring into the motives of the Committee in adopting the resolution turning over to the police authorities the facts revealed by their investigation, the Court has run afoul of the decisions of this Court prohibiting inquiry into the motives of legislators.

Tenney vs. Brandhove, 341 U.S. 367, 377, 95 L. ed. 1019, 1027.

Arizona vs. California, 283 U.S. 423, 455, 75 L. ed. 1154, 1166 and cases cited.

Communist Party vs. Subversive Activities Control Board, 367 U.S. 1, 86, 6 L. ed 2d 625, 683.

Barenblatt vs. U.S., 360 U.S. 109, 132, 3 L. 2d 1115, 1132.

Another departure from accepted practice was the probative force accorded by the Court to the allegations of the Dombrowski complaint which was verified on information and belief only. Prior to the 1963 amendment of Rule 56(e) of the federal rules, all circuits except the Third ruled that pleading allegations do not create an issue of fact as against a motion for summary judgment supported with affidavits.(5) The 1963 amendment, by adding two sentences to the rule, made it perfectly clear

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(5) *Barron & Holtzoff, Federal Practice and Procedure*, Vol. 3, p. 153, Section 1235. 1.

that "an adverse party may not rest upon the mere allegations or denials of his pleading" in such cases. Since then the Third Circuit has followed the rule laid down by other circuits.(6)

Nevertheless, none of the pleadings of plaintiffs or defendants accuse the individual members of the Committee of taking part in any alleged conspiracy to deprive plaintiffs of their constitutional rights.

3. The prime purpose of summary judgment procedure is to secure just, speedy, and inexpensive determination of any action. It is a far-reaching progressive reform in judicial procedure to improve the machinery of justice, promote the expeditious disposition of cases and avoid the vexation, annoyance and expense of unnecessary trials, where no genuine issue as to a material fact is raised.

Barron & Holtzoff's Federal Practice and Procedure, Vol. 3, pp. 97-98, Sec. 1231.

Albatross Shipping Corp. vs. Stewart, (CA5) 326 F. 2d 208.

Hollingshead vs. Carter Oil Company, (CA5) 221 F. 2d 920.

Blood vs. Fleming, (CA10) 161 F. 2d 292.

Petitioners are professional and business men from various parts of the State of Louisiana, three of whom

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(6) *Robin Construction Co. vs. U.S.*, (CA 3), 345 F. 2d 610, 614-615.

reside more than 300 miles distant from the trial court in New Orleans. There are fifteen defendants including petitioners. To require these nine petitioners to employ counsel and undergo the great expense, annoyance and vexation of a protracted jury trial in a distant city, in view of the record in this case, is to defeat the just and salutary purpose of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

/s/ W. Scott Wilkinson,
Counsel for Petitioner.

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MEADOWS & HALL
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September 6, 1967.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition for certiorari and appendices thereto has been served on opposing counsel by depositing copies thereof in the United States Post Office, with first class postage, prepaid, addressed to counsel of record at their post office addresses as follows:

Mr. C. Ellis Henican
Mr. C. Ellis Henican, Jr.
Henican, James & Cleveland
Attorneys at Law
Suite 2601
225 Baronne Street
New Orleans, Louisiana 70112

this 6 day of September, 1967.

S/ W. Scott Wilkinson
of Counsel

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Section 6, Clause 1:

Section 6. The Senators and Represenatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

House Concurrent Resolution No. 13
Regular Session, 1960 Louisiana Legislature:

WHEREAS, this state and this country face grave public danger from enemies both within and without our boundaries, and

WHEREAS, these subversive groups and persons under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies, and

WHEREAS, Louisiana, as one of the laboratories of this great country, may study profitably this problem within its boundaries and enact remedial legislation if facts therefor are made available, and

WHEREAS, necessary and desirable legislation to meet this grave problem and to assist local enforcemtnt officers to be effective must be based on a thorough and impartial investigation by a competent and active legislative committee.

THEREFORE, BE IT RESOLVED by the House of Representatives of the Legislature of the State of Louisiana, the Senate concurring therein, that there is hereby created the Joint Legislative Committee on Un-American Activities which Committee shall consist of ten members, five to be appointed by the Speaker of the House of Representatives from the membership of the House and five to be appointed by the President of the Senate from the membership of the Senate which committee shall study, investigate and analyze all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the State of Louisiana, or of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent in which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited

to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution.

Be it Further Resolved that the Committee shall have the authority to:

(a) Select a chairman and a vice chairman from its membership; and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) Contact and deal with such other agencies, public or private, as it may deem necessary for the rendition and affording of such services, facilities, studies and reports as will best enable the committee to carry out the purposes for which it is created.

(c) Cooperate with and secure the cooperation of parish, city, city and parish, and other local law enforcement agencies in investigating any matter within the scope of this resolution,

(d) Cooperate with and meet with similar committees of other states and of the Federal Government, or representatives thereof, outside of this state, and expenses necessarily incurred in connection therewith by any of the members or staff of the committee, thereunto duly authorized by the chairman, shall constitute a proper charge against the sums allocated to the committee,

(e) Do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this resolution, and

(f) Adopt and from time to time amend such rules governing its procdure as may appear appropriate.

Be it further Resolved that every department, commission, board, agency, officer and employee of the State Government of Louisiana and of any political subdivision, parish, city or public district of or in this state, shall furnish the committee and any subcommittee, upon request, any such information, records and documents as the Committee or subcommittee deems proper for the accomplishment of the purposes for which the committee is created; provided, however, that this provision shall not extend to, nor shall it be construed to make available to the committee or any subcommittee thereof, any record or other document excluded from the application of the Public Records Act, as found in Part I of Chapter I of Title 44 of the Louisiana Revised Statutes of 1950, or any other record or document which under the law is made a confidential record.

Be It Further Resolved that the committee shall have the power and authority to hold hearings at any place in Louisiana, which meetings may be public or private, to subpoena witnesses, administer oaths, require the production of books and records pertinent to any inquiry before the Committee and to do all other things necessary to accomplish the purposes of this resolution.

Be It Further Resolved that the Committee shall have authority to apply to any court of competent jurisdiction for enforcement of any order issued by it for the production of books, records or any order issued by it for the production of books, records or other documents or to compel the attendance of any witnesses subpoenaed to appear before it and, upon request of the commission, the Attorney General shall prosecute any witness who is guilty of refusal to testify or who gives false testimony, and persons guilty of false swearing or of giving false testimony shall be punished in accordance with the criminal laws of this state relating to false swearing or perjury, as the case may be, and

Be It Further Resolved that the committee shall submit its findings and recommendations to the Legislature at each of its regular sessions and at such other times as the committee may deem necessary and desirable.

Be It Further Resolved that the members of the committee created herein shall serve without compensation but shall receive the same per diem and travel allowance in the performance of their duties as is provided for members of the Legislature.

Be It Further Resolved that the per diem and travel allowance herein authorized and all other expenses incurred by the committee shall be paid out of funds available to the presiding officers of the two houses of the Louisiana

Legislature for expenses of the Legislature and Interim Committees; provided, however, that the disbursements for all expenses incurred by the committee, including the payment of per diem and travel allowances for members as herein authorized shall be approved by the chairman of the committee.

Rules of Civil Procedure,
Rule 56. Summary Judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts

as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwse provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963.

APPENDIX B

OPINIONS AND DECREES BELOW

Opinion and order of United States District Court for the Eastern District of Louisiana:

Minute Entry February 18, 1965 Ainsworth, J.

ORDER GRANTING MOTIONS OF THIRD-PARTY DEFENDANTS, WILLIE P. ARCENEAUX, DUDLEY A. BERNARD, CECIL R. BLAIR, SAMUEL S. BROUSSARD, WILLIAM T. CARPENTER, JACKSON B. DAVIS, WELLBORN JACK, MIKE JOHN, JR., and HAROLD MONTGOMERY, TO DISMISS FOR SUMMARY JUDGMENT.

(Number and title omitted)

This matter came on for hearing on a former day on motions of third-party defendants, Willie P. Arceneaux, Dudley A. Bernard, Cecil R. Blair, Samuel S. Broussard, William T. Carpenter, Jackson B. Davis, Wellborn Jack, Mike John, Jr., and Harold Montgomery, to dismiss the complaint and third-party complaint against them and for summary judgment.

The court, having heard the argument of counsel and having considered the briefs, affidavits and exhibits in support thereof, is now ready to rule.

IT IS ORDERED:

That the motions of third-party defendants to dismiss and for summary judgment be, and the same are hereby, GRANTED.

REASONS

The question presented by these motions is whether or not a cause of action has been asserted against third-party defendants, members of The Joint Legislative Committee on Un-American Activities of the Louisiana Legislature; specifically whether they or any of them have ever entered into a conspiracy, plan or agreement to deprive plaintiffs of their rights under the Constitution of the United States, by participating in the alleged illegal search of plaintiffs' offices and the premises of plaintiff Dombrowski, and the seizure of certain files, papers and objects therefrom. Third-party defendants have been joined by defendant, Pfister, Chairman of the Committee.

All third-party defendants have submitted affidavits showing that none of them authorized the arrest, search or seizure; none of them was present when the search of the premises and offices of plaintiffs was made by the New Orleans police; and that none of them participated in any way in the alleged illegal search and seizure. The affidavits show that the activities of third-party defendants were at all times limited to investigating the activities of plaintiffs and to authorizing the Chairman of the Committee to turn over to the District Attorney for the Parsh of Orleans the evidence heretofore found as a result of such investigations. This authorization was given to the Chairman at a hearing of the Joint Legislative Commttee on Un-American Activities held at Baton Rouge, Louisiana, on November 8, 1963, at which three of the third-party defendants were not present. Certain

resolutions and oral motions were made and adopted at this hearing, as shown in the following excerpts from the proceedings:

"BY MR. ROGERS:

"Mr. Arceneaux's Resolution reads as follows: 'Whereas the evidence presented to this Committee is overwhelmingly conclusive, and far more than an adequate foundation, establishing beyond any reasonable doubt the true nature and character of the Southern Conference Educational Fund, Inc., as a communist-front organization, operated and managed primarily by people who have been clearly and reasonably identified as Communists; be it therefore hereby resolved, that this Committee does declare as a legislative finding that the Southern Conference Educational Fund, Inc., is in fact a communist-front organization, and is also a subversive organization because it is aiding and abetting the communist-conspiracy.'

"BY MR. PFISTER:

"Members of the Committee, you have heard the Resolution presented by Representative Willie Arceneaux; what is your pleasure?

"BY MP MIKE JOHN:

'I second the motion.

"BY MR. PFISTER:

"The Resolution has been seconded by Representative Mike John, any comments? All those in favor of

adopting this Resolution will show their affirmation by saying, 'aye.' (Committee members unanimously voted, aye.) Those opposed say, 'nay.' Hearing no nays, the Resolution stands adopted, and will be so entered into the record."

. . . . .

"BY MR. PFISTER:

"Gentlemen: It is my opinion that the evidence presented here today is certainly voluminous, and I think you will agree it's overwhelmingly conclusively beyond any possible doubt, establishing the Southern Conference Educational Fund as a communist-front. We have a Resolution presented by Representatives Willie Arceneaux to this effect which was already adopted. I would now suggest that all of this evidence, like the other evidence we have already accumulated during the eleven months of our intensive investigation which has already been turned over to the District Attorney of Orleans Parish, along with that evidence be turned over to the District Attorney of Orleans Parish. I will ask one of the members of the Committee if he will so do it.

"BY REPRESENTATIVE BERNARD:

"I will so move

"BY REPRESENTATIVE MIKE JOHN:

"I will second the motion.

"BY MR. PFISTER:

"It's been moved by Representative Bernard, and seconded by Representative Mike John that all of this evidence, along with the other evidence we have accumulated over the period of eleven months be turned over to the District Attorney of Orleans Parish. We are not a prosecuting agency, gentlemen, we never have been, we never claimed to be, and our function is to establish the facts. We will now turn them over to the District Attorney of Orleans Parish who is the proper prosecuting agency. All in favor of this Motion, say 'aye', (unanimous). Opposed? (None). Hearing none, so ordered."

Beyond this there is no evidence by countervailing affidavit or otherwise of participation by any of the third-party defendants in any of the tortious acts alleged by plaintiffs, nor of any knowledge thereof.

The transcript of the hearing, from which the above excerpts have been made, the pleadings, and the uncontroverted affidavits of third-party defendants clearly show that there is no genuine issue as to any material fact and third-party defendants are entitled to judgment as a matter of law.

APPENDIX B

Corrected Opinion and Order of the United States District Court for the Eastern District of Louisiana:

Minute Entry March 31, 1965 Ainsworth, J.

ORDER AND REASONS THAT THE MOTION OF DEFENDANTS FREDERICK B. ALEXANDER, JR. AND JACK N. ROGERS, TO HAVE THE COURT CORRECT THE "REASONS" ASSIGNED IN ITS ORDER OF FEBRUARY 18, 1965 BE GRANTED.

(Number and title omitted)

This matter came on for hearing on this day on motion of defendants, Frederick B. Alexander, Jr. and Jack N. Rogers, to have the court correct the "Reasons" assigned in its order entered February 18, 1965.

The court, having heard the argument of counsel and having considered the affidavits and exhibits in support thereof, is now ready to rule.

IT IS ORDERED:

That the motion of defendants, Frederick B. Alexander, Jr. and Jack N. Rogers, to have the court correct the "Reasons" assigned in its order of February 18, 1965 be, and the same is hereby, GRANTED, but only to the extent as shown herein.

The "REASONS" assigned by this court for granting the motions of third-party defendants, Willie P. Arceneaux, et al., to dismiss and for summary judgment, con-

tained in Minute Entry dated February 18, 1965, are hereby amended to read as follows:

REASONS

The question presented by these motions is whether or not a cause of action has been asserted against third-party defendants, members of The Joint Legislative Committee on Un-American Activities of the Louisiana Legislature; specifically whether they or any of them have ever entered into a conspiracy, plan or agreement to deprive plaintiffs of their rights under the Constitution of the United States, by participating in the alleged illegal search of plaintiffs' offices and the premises of plaintiff Dombrowski, and the seigure of certain files, papers and objects therefrom. Third-party defendants have been joined by defendant, Pfister, Chairman of the Committee.

All third-party defendants have submitted affidavits showing that none of them authorized the arrest, search or seizure; none of them was present when the search of the premises and offices of plaintiffs was made by the New Orleans police; and that none of them participated in any way in the alleged illegal search and seizure. The affidavits show that the activities of third-party defendants were at all times limited to investigating the activities of plaintiffs and to authorizing the Chairman of the Committee to turn over to the District Attorney for the Parish of Orleans the evidence heretofore found as a result of such investigations.

There is no evidence by countervailing affidavit or otherwise of participation by any of the third-party defendants in any of the tortious acts alleged by plaintiffs, nor of any knowledge thereof.

The pleadings and the uncontroverted affidavits of third-party defendants clearly show that there is no genuine issue as to any material fact and third-party defendants are entitled to judgment as a matter of law.

Opinion and Decree of the United States Court of Appeals for the Fifth Circuit:

Number and Title Omitted)
(November 14, 1966.)

Before BROWN, BURGER,* and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The complaint filed in this action is a by-product of *Dombrwski v. Pfister.*(1) Dombrowski grew out of two incidents: (1) an investigation of the Southern Conference Educational Fund by the Louisiana Joint Legislative Committee on Un-American Activities; (2) seizure of the Fund's records and papers and the arrest of several of the Fund's officers following the investigation. The complaint alleges that the investi-

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* Of the District of Columbia Circuit, sitting by designation.

(1) 380 U. S. 479, 85 S.Ct. 116, 14 L.ed.2d 22 (1965), *reversing* 227 F. Supp. 556 (E.D.La. 1964).

gation and the raid were part of a conspiracy to deprive them of their constitutional rights in violation of 42 U.S.C. §§1981, 1983, and 1985(3). The plaintiffs ask for preventive relief and damages against a number of defendants, including James H. Pfister, the Chairman of the Joint Committee. Pfister filed a third-party complaint against the other members of the Joint Committee, alleging that they were liable to him for all or part of any sum the plaintiffs might recover from him. His theory of the case is that any of his actions giving rise to liability to the plaintiffs were authorized and approved by the entire committee. Both Pfister, in his answer and in a motion for summary judgment, and the third party defendants, in their motions to dismiss and for a summary judgment, raise the defense of legislative immunity. See *United States v. Johnson*, 1966, U.S , S.Ct. , 15 L.Ed.2d 683; *Tenney v. Brandhove*, 1951, 341 U. S. 367, 71 S.Ct. 783, 95 L. Ed. 1019. The district judge denied Pfister's motion, but granted the third party defendants' motion for summary judgment. This appeal questions only the judgment in favor of the third party defendants.(2) We reverse.

This case requires that we scrutinize closely the events leading to the summary judgment in favor of the third party defendants. Pfister filed his third party com-

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(2) Both before and after the summary judgment in favor of the other members of the committee, Pfister moved for summary judgment. The denial of these motions is not before the Court at this time. For this reason Pfister's theory that what is sauce for he goose is likewise for the gander is not applicable.

plaint October 1, 1964. December 30, 1964, the third party defendants filed their answer and motion to dismiss, based on the theory of legislative immunity. January 18, 1965, Pfister filed a paper captioned "Opposition . . . to Motions of Third-Party Defendants . . . To Dismiss". The last paragraph of this paper expressly incorporated "in support of said opposition . . . all of the pleadings, affidavits, depositons, judgments, and minute entries heretofore filed in these proceedings". Ten days later, the third party defendants filed a motion for summary judgment and introduced the affidavits of all of the members of the committee. Although the motion set forth no theory on which the committee members were entitled to summary judgment, the affidavits indicate that the theory was, once again, legislative immunity. March 15, 1965, the district judge granted the summary judgment. In his amended "Reasons" the district judge stated:

> The affidavits show that the activities of third-party defendants were at all times limited to investigating the activities of plaintiffs and to authorizing the Chairman of the Committee [Pfister] to turn over to the District Attorney for the Parish of Orleans the evidence heretofore found as a result of such investigations. [¶] There is no such evidence by countervailing affidavit or otherwise of participation by any of the third-party defendants in any of the tortious acts alleged by plaintiffs, nor of any knowledge thereof.

While it is true that Pfister filed no opposition to the motion for summary judgment, he did not oppose the preliminary motion to dismiss, and in his "Opposition" incorporated all of the affdavits previously introduced in the case. We have concluded, therefore, that Pfister's "Opposition" to the motion to dismiss should be treated as a response to the motion for summary judgment. The third party defedants' motion to dismiss was incorporated in their answer, and therefore may not be viewed as a motion under Rule 12(b) of the Federal Rules of Civil Procedure. Rule 12(b) provides that any defenses presented by motion "shall be made before pleading . . ." The motion must, therefore, be taken as a motion for judgment on the pleadings. In this view, the motion to dismiss assumes a very close relationship to the motion for summary judgment. Rule 12(c) provides that a motion for judgment on the pleadings may be treated as a motion for summary judgment when matters outside the pleadings are introduced. Here the motion for summary judgment set forth no ground upon which it should be granted, but was merely a vehicle for the filing of affidavits to support the motion to dismiss and to convert *that motion* into a motion for summary judgment under Rule 12(c). Absent the legal terminology, the motion for summary judgment and the motion to dismiss were very nearly the same thing.

Since Pfister had opposed the motion to dismiss when it was originally filed,(3) there was no reason for

(3) The district judge did not rule on the motion to dismiss until after the motion for summary judgment and the affidavits had been filed. He then disposed of both motions together.

him to renew his opposition when the motion reappeared in the form of a motion for summary judgment. Because he had incorporated all of the preceding affidavits, depositions, judgments, and minute entries in his original answer to the motion to dismiss, there was no need for him to file additional material to meet the affidavits of the third party defendants. He was not resting "upon the mere allegations or denials of his pleading",(4) but was relying on the affidavits and other material incorporated in his "Opposition" to the original motion to dismss. Although it would have been more artful pleading for Pfister to have reintroduced all this material, to require him to do so at the risk of a summary judgment would lead only to a wasteful duplication.

We hold, treating Pfister's "Opposition" as a response to the motion for summary judgment, that the district judge erred in granting the motion.

Among the affidavits incorporated in Pfister's "Opposition" was an affidavit introduced by the plaintiff, James A. Dombrowski. In it Dombrowski declared upon oath that on the day of the raid Pfister made a statement to the press in which he described the purpose and method of carrying out the investigation and said, "All of the members of the committee have unanimously concurred in the operation which took place today." If Pfister did make such a statement, the truth or falsity of the statement will bear on the accuracy of the committee members' affidavits

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(4) Fed. R. Civ. Pro. 56(e).

that they did not authorize the raids and in fact knew nothing of them before they were carried out. Resolution of this issue ie, whether Pfister made such a statement and whether it was accurate has a serious bearing on the question whether Pfister and the other members of the committee were acting in the sphere of *legitimate* legislative activity",[5] which would entitle them to immunity.[6]

Dombrowski's affidavit and the affidavits of the committee members create a "genuine issue as to . . . [a] material fact". Fed. R. Civ. Pro. 56(c). In such circumstances, summary judgment is not proper. "The moving party has the burden of positively and clearly demonstrating that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against him." *National Screen Serv. Corp. v. Poster Exchange, Inc.*, 5 Cir. 1962, 305 F.2d 647, 651; *accord, Poller v. Columbia Broadcasting System, Inc.*, 1962, 368 U. S. 464, 82 S. Ct. 486, 7 L.Ed.2d 458.

Since the affidavits introduced by Pfister in his "Opposition" to the motion to dismiss and those of the other members of the committee raise a genuine issue as to a material fact, the district court's judgment granting the third party defendants' motion for summary judgment must be REVERSED. The case is REMANDED for further proceedings consistent with this opinion.

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(5) Tenney v. Brandhove, 1951, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019, 1927. (Emphasis added.)

(6) The district judge relied on this issue of fact and its materiality in denying Pfister's second motion for summary judgment.

Opinion and Decree of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing:

(Number and Title Omitted)
(June 29, 1967.)

ON PETITION FOR REHEARING

Before BROWN, BURGER,* and WISDOM, Circuit Judges.

PER CURIAM: The petition for rehearing indicates that the third-party defendants fail to give effect to the theory of both the original and the third-party complaints. The petitioners insist that there is no genuine issue of material fact whether the members of the legislative committee actually participated in the illegal raids. The thrust of the original complaint is, however, not that Pfister and the other committee members participated in the raids, but that the raids were carried out "under the direction and in behalf of [the] defendant". In other words the question is whether the committee's investigation was undertaken for a legitimate purpose or with an eye to depriving the plaintiffs of their constitutional rights, either through raids, through harassment and prosecution, or otherwise, whether by the committee's own acts or by the acts of others instigated by the Committee. The record incorporated in Pfister's "opposition", clearly reveals genuine issues of material fact as to these issues. The petition for rehearing is therefore DENIED.

APPENDIX C

MISCELLANEOUS

Minutes of Committee Meeting, September 30, 1963

MINUTES OF COMMITTEE MEETING OF SEPTEMBER 30, 1963 AT 4022 SOUTH RAMSEY DRIVE, BATON ROUGE, LOUISIANA:

The following members were present: Chairman Pfister, Representatives Dudley A. Bernard, Mike John, Jr. and Wellborn Jack; Senators Samuel S. Broussard, Cecil R. Blair and Harold Montgomery; Counsel Rogers and Staff Director Col Alexander.

Chairman Pfister called the meeting to order at 6:30 p.m.

Counsel Rogers briefed the Committee on all legal aspects of Project 50 (SCEF) with the recommendation that the matter be turned over to the police.

Col. Alexander briefed the Committee on all mechanical operations of the Project 50 (SCEF) investigation.

A motion was made by Rep. Mike John, Jr., and seconded by Representative Dudley Bernard that Col. Alexander and Counsel Rogers be authorized to carry through the entire operational plan of the Project 50 (SCEF) investigation, including full cooperation with the police, as outlined at the meeting. The motion was passed unanimously.

Chairman Pfister appointed a sub-committee to be in New Orleans on October 4 and 5 on call — the committee to consist of Chairman Pfister, Rep. Mike John, Jr., and Rep. Dudley Bernard.

Chairman Pfister called for a meeting of the entire Committee to be held in the Committee office at 10:00 a.m. on October 8.

There being not further business the meeting was adjourned.

S/FREDERICK B. ALEXANDER, JR.
FREDERICK B. ALEXANDER, JR.
Colonel USA (Ret)
Staff Director